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Supreme Court, U.S.
FILED

No. 04- 041172 MAR 1 - 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,

Petitioner,

v.

ELDER OFFSHORE LEASING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit affirmed the district court's ruling that ownership of a Venezuelan Navy living quarters remained with the builder and did not pass to The Bolivarian Republic of Venezuela ("Venezuela"), a sovereign state. This decision conflicts with the Louisiana Supreme Court's prior interpretation of when title passes.

One question is presented:

1. Should title to the Venezuelan Navy living quarters pass to Venezuela when the Louisiana Supreme Court has previously held that title should pass in similar circumstances.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was not published, but can be found at *Elder Offshore Leasing v. Bolivarian Republic of Venezuela*, 116 Fed. Appx. 541, 2004 WL 2725812 (5th Cir. 2004) (App. A). The Fifth Circuit affirmed the February 19, 2004 decision of the United States District Court for the Western District of Louisiana, which is not reported (App. B and C).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Fifth Circuit's opinion was rendered on December 1, 2004.

STATEMENT OF THE CASE

The Isla de Aves is Venezuela's furthest outpost in the Caribbean Sea and defines the extent of Venezuela's territorial waters. Venezuela's Navy has operated the Simon Bolivar Base on the Isla de Aves since 1978. Since then, the island has had living quarters that were fixed on a concrete base, and Venezuelan personnel have been stationed there. The Navy used the base to carry out important hydrographic, cartological and meteorological studies.

By 2001, the existing structures had come to the end of their useful life, and Venezuela decided that the time had come to repair the concrete base and purchase new modules to serve as the living quarters for the Venezuelan naval personnel stationed there. The proposed modules were to be essentially a three-story dormitory/laboratory with work areas, residential quarters, recreation areas, kitchen facilities and a rooftop heliport.

On December 28, 2001, Venezuela entered into a contract with Totalmar, a Venezuelan Company, to prepare the site and purchase, transport and install the modules on it at a total price of $9,750,000. The required specifications for the modules were set forth in the contract. It was clearly contemplated in the contract that these modules would be supplied by a third-party vendor.

Payment under the contract was to be made in installments, with a final installment of 10 percent, or $975,000, due after the modules were transported and installed on the Isla de Aves. Venezuela has paid $8,775,000 of the contract price, which is the total amount it was billed by Totalmar. It made its payments on April 2, 2002, May 31, 2002, November 6, 2002, December 18, 2002 and December 26, 2002.

Pursuant to the requirements of its contract with Venezuela, Totalmar contracted with Elder Offshore, a Texas company, for Elder to acquire, fit and refurbish the modules. The contract between Elder and Totalmar left no mystery as to what the modules were going to be used for. The Elder contract specifically referenced the contract with Venezuela:

> Whereas, Company [Totalmar] intends to install a habituation module and infrastructure system on a marine platform at the Isla de Aves in the Caribbean operated by Armada de Venezuela, pursuant to and in accordance with the Turnkey Engineering, Procurement and Construction Contract (EPC Contract), dated as of [date left blank], 2002, between Republica Bolivariana de Venezuela, Ministerio del Ambiente y de los Recursos Naturales (owner) and Company.

(Bracketed material added as explanatory, parenthesis in original). This contract goes on to specifically define Venezuela as the "Owner" in paragraph 1.11.

During the course of the fitting and refurbishment of the modules in Lake Arthur, Louisiana, representatives of the Venezuelan Navy often traveled to Lake Arthur to observe the progress. Again, everyone, including the subcontractors involved with the project, was well aware that the modules were going to serve as a Venezuelan governmental base on the Isla de Aves and that Venezuela was the ultimate owner of the modules.

As of the time of the trial, the modules were in their completed form and had been so since at least December, 2002. They are so complete that Venezuelan Naval personnel could have lived there, performing their work, cooking their meals, watching television, playing bumper pool or ping-pong in the common recreation area or exercising in the fully outfitted gymnasium.

Although Elder completed all of its work (with only very minor exceptions pertaining to certain bracing work that could not be done until the modules were lifted off their temporary supports in preparation for transportation) and although Totalmar was paid by Venezuela, Totalmar has not paid Elder for all of its work. As a result, Elder did not pay its subcontractors and they filed liens against the modules, which resulted in the modules being sequestered. Subsequently, Venezuela put up approximately $3,500,000 in bonds as security for the release of the modules.[1] The modules were subsequently transported to the Isla de Aves and are in use there now.

This case was brought in the United States District Court, Western District of Louisiana, by Elder Offshore Leasing,

1. Under their terms, the bonds pay if this Court either refuses to review the Fifth Circuit's judgment or upholds that judgment.

Inc., a Delaware corporation with its principal place of business in Texas, against Safe Haven Enterprises, Inc., Alta S. Baker and John Baker, all of whom are Louisiana residents. Jurisdiction for the original suit is granted by 28 U.S.C. § 1332. Then, the Bolivarian Republic of Venezuela intervened in this case and sued both Elder and Safe Haven.

Jurisdiction is proper for this intervention under 28 U.S.C. § 1332(a)(4). On February 19, 2004, the district court entered a ruling granting ownership of the modules to Elder. The district court certified its judgment as final and appealable judgment under Rule 54(b). On February 27, 2004, Venezuela filed a Notice of Appeal. On June 30, 2004, the Fifth Circuit docketed this instant appeal. On December 1, 2004, the Fifth Circuit entered its decision.

REASONS FOR GRANTING THE PETITION

This case involves a sovereign state's purchase of living quarters for its navy. The interpretation of this contract, therefore, has an effect on international relations. This contract states that title to the modules will pass to Venezuela after there has been "appropriation of the Work or any part thereof to the Order." This phrase has previously been interpreted by the Louisiana Supreme Court to mean that title will pass from the seller when items have been set aside for use in the contract. In this case, all of the items attached to the modules have been appropriated to the order for Venezuela. Therefore, under Louisiana law title should have passed to Venezuela. Nonetheless, the Fifth Circuit disregarded Louisiana law and ruled that title did not pass to Venezuela.

All parties involved in this case, and especially Elder, knew that the modules were being refurbished and fitted for the specific benefit of Venezuela to function as the Simon Bolivar Base on the Isla de Aves. Everyone clearly knew that when they were completed, they would be Venezuela's property. Elder's knowledge that Venezuela was the ultimate "Owner" of the modules is apparent from the designation of Venezuela as "Owner" in Elder's contract with Totalmar. The definitions section, paragraph 1.11 reads: "'Owner' means Republica Bolivariana de Venezuela, Ministerio del Ambiente y de los Recursos Naturales."

If the explicit designation of Venezuela as the "Owner" was not, in itself, sufficient to defeat Elder's claims of ownership under its contract, a separate provision makes it clear that Elder would not be the modules' owner because title to the modules had passed. Paragraph 14.1 governs when title to the modules passes from Elder:

> 14.1 Title in the Work shall pass to the Company [Totalmar] on the earliest of:
>
> (a) appropriation of the Work or any part thereof to the Order; or
>
> (b) payment for the Work; or
>
> (c) delivery of the Work by Contractor at the specified delivery point.

Under Paragraph 14.1 title transfers as soon as one of the enumerated events occurs. In this case, the parties agree that the Elder has not been paid the full purchase price and that the modules have not been delivered. Therefore, the

question of whether title has passed from Elder depends on Paragraph 14.1(a). Under this paragraph, title in the modules passes from Elder when there is an "appropriation of the Work or any part thereof to the Order."

"Work" is defined in Paragraph 1.14 as "the goods, services and/or equipment and documentation to be provided under the contract. . . ." Order is not defined specifically in the contract, but the only "Order" referenced in the contract is the order for the modules. The plain meaning of this provision is that when any item, be it an electrical generator, a water purifier, a showerhead, a roll of floor tile, a walk-in freezer, a computer, a bumper pool table or a piece of exercise equipment, was appropriated and segregated for use on the modules, title to it passed from Elder. As of December, 2002, all of the "Work" had been appropriated to the Order since the "Work" itself sat complete in Lake Arthur, Louisiana. Therefore, under the plain meaning of the contract, title in the modules has passed from Elder. *See T. L. James and Co. v. Traylor Bros., Inc.*, 294 F.3d 743, 750 (5th Cir. 2002) (holding that if a contract is unambiguous, "the terms of the contract must be enforced as written.").

While no decisions to discuss the meaning of "appropriation of the Work or any part thereof to the Order," there are various decisions that examine what it means to "appropriate goods to the contract," which is a similar phrase used for a similar purpose in many contracts for the sale of goods. In these decisions, the courts have held that goods are appropriated to a contract when the goods have been segregated or allocated to the purchaser in some way. *See Mitsubishi Int'l Corp. v. Clark Pipe and Supply Co.*, 735 F.2d 160, 165 (5th Cir. 1984) *quoting Modern Farm Service, Inc. v. Ben Pearson, Inc.*, 308 F.2d 18, 22 (5th Cir. 1962)

("when goods to be delivered by the seller to the buyer become segregated from other goods or appropriated to the contract so that the objects to be sold are readily identifiable, the same becomes executed, and at that time title to the goods passes to the buyer."); *Edgwood Co. v. Falkenhagen*, 92 So. 703 (La. 1922) (holding that the sale of 20 barrels of whiskey became complete when they "were segregated from the balance of the plaintiff's stock and put aside as the property of the defendant"); *Collector of Revenue v. J.L Richardson Co.*, 247 So. 2d 151, 156 (La. App. 4th Cir. 1971) (citing the holding in *Edgwood* with approval); *Texas Hay Ass'n v. Angleton State Bank*, 291 S.W. 846 (Tex. Comm'n App. 1927) (holding that a contract for the sale of hay became complete when the farmer "made this hay and baled it and stored it in his barn"). Once the items have been segregated for the purchaser's order nothing more is required for title to pass to the purchaser. *Edgwood*, 92 So. 703 (holding that the "appropriation ... completed the sale absolutely, whereby defendant became the owner of the 20 barrels of whisky thus appropriated").

The district court and the Fifth Circuit interpreted the phrase "appropriation of the Work or any part thereof to the Order" in a way that is inconsistent with both a plain reading of the contract and the above-cited cases. The Fifth Circuit also interpreted paragraph 14.1(a) to give Elder the unilateral right to decide when to pass title to the modules.

Elder has argued that Paragraph 14.1(a) exists to "protect the seller" by allowing Elder to pass the risk of the modules to the buyer prior to their delivery. This interpretation, however, is directly contradicted by other provisions in the contract. For instance, Paragraph 14.2 of the contract

specifically provides that Elder retains risk of loss even after title transfers:

> Notwithstanding passage of title (in whole or in part) on the occurrence of any of the events in 14.1 above, risk shall remain with Contractor until delivery of the Work to Company in accordance with the provisions of the Contract.

In light of Paragraph 14.2, the phrase "appropriation of the Work or any part thereof" cannot exist for the purpose of allowing Elder to pass the risk to the buyer prior to delivery of the modules. Instead, the provision simply means what it says – that Elder passes title to items as soon as they are appropriated for use on the modules. The contract contemplates that this can happen prior to payment and prior to delivery. *Cable & Connector Warehouse, Inc. v. Omnimark, Inc.*, 96-2831 (La. App. 4 Cir. 09/12/1997), 700 So. 2d 1273, 1275 (it is permissible for title to pass prior to risk of loss). Elder may not like that now, but that is what its contract says, and that contract forms the law between the parties. *See* LA. CIV. CODE art. 1983. As a result, now that the modules are complete and since the various equipment is either affixed to the modules or is at least on board the modules, Elder is not the owner of any of it because title passed under its contract. Therefore, this Court should grant review of this matter.

CONCLUSION

For the reasons listed above, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED DECEMBER 1, 2004

In the
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 04-30219
Summary Calendar

ELDER OFFSHORE LEASING, INC.,

Plaintiff-Intervenor Defendant-Appellee,

VERSUS

BOLIVARIAN REPUBLIC OF VENEZUELA,

Intervenor Plaintiff-Appellant,

v.

SAFE HAVEN ENTERPRISES, INC., et al.,

Defendants.

Before, DAVIS, SMITH, and DENNIS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

The Bolivarian Republic of Venezuela ("Venezuela") brings this interlocutory appeal challenging the district court's determination that title to disputed property never passed from Elder Offshore Leasing, Inc. ("Elder"). Because the contractual provision on which Venezuela relies is not operative in the current dispute, title never passed, and we affirm.

I.

Requiring new living quarters for the Simon Bolivar Naval Base on Isla de Aves,[1] Venezuela contracted to have new living quarters, or "modules," constructed for the base. To build the modules (three-story dormitory-type structures with work areas, residential quarters, recreations areas, kitchens, and a rooftop heliport), Venezuela contracted with Totalmar, a Venezuelan corporation, which in turn contracted with Elder to procure and refurbish the modules. The Venezuela/Totalmar contract provided that Totalmar would prepare the island site and purchase, transport, and install the modules, while under the Totalmar/Elder contract, Elder would procure the modules and renovate them to Venezuela's specifications.

Although Venezuela paid Totalmar, Totalmar failed to pay Elder for all its work, so Elder did not pay its subcontractors. Consequently, multiple civil actions were

1. Isla de Aves is Venezuela's furthest outpost in the Caribbean Sea. The naval base is used for hydrographic, cartological, and meteorological purposes, and Venezuela needs the modules to maintain its presence on the island and therefore continue to claim sovereignty over it.

instituted in Louisiana (where the construction was taking place). Elder sued Safe Haven Enterprises ("Safe Haven"), which is alleged by Elder to be a joint venturer with Elder in the construction of the modules. Safe Haven responded by filing a lien against the modules and sued to enforce that lien. Safe Haven's case was removed to federal court and consolidated with Elder's original action against Safe Haven. At that point, numerous subcontractors and lienholders intervened in the federal action, as did Venezuela.

Venezuela claims that title to the modules has passed to it under the Elder/Totalmar contract and that sovereign immunity protects the property from attachment. The Totalmar/Elder contract provides that title passes on the earliest occurrence of any three possibilities: "(a) appropriation of the Work or any part thereof to the Order; or (b) payment for the Work; or (c) delivery of the Work by Contractor at the specified delivery point." Because neither party contends that payment was made or that delivery occurred,[2] the sole issue is the meaning and application of "appropriation of the Work or any part thereof to the Order."

At a bench trial, the district court adjudicated the current ownership of the modules and reserved the disposition of

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2. Although the modules were eventually moved to Isla de Aves, we operate under the legal fiction that they remain at their manufacturing location in Louisiana. Pursuant to a Joint Stipulation entered into by Elder, Venezuela, and the other lienholders, Venezuela posted a cash bond in exchange for immediate possession. By the terms of the Joint Stipulation, the cash bonds will pay to Elder and the lienholders unless the court rules that Venezuela is the owner of the modules and sovereign immunity protects them from seizure.

the remaining claims for another day. On considering the evidence and arguments of counsel, the court held that, under the operative contractual provisions, title never passed to Venezuela, but remained with Elder. In its oral ruling, the court reasoned that the disputed contractual provision exists to protect the seller, and therefore the court disagreed with Venezuela's reading of the contract. The ruling was certified for appeal under Federal Rule of Civil Procedure 54(b). *See Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218, 1220 (5th Cir. 1990) (per curiam) (en banc).

II.

We review the interpretation of a contract, which is a conclusion of law, *de novo*. *See City of New Orleans v. Mun. Admin. Servs., Inc.*, 376 F.3d 501, 506 (5th Cir. 2004). This dispute is governed by the terms of the contract—specifically, the above-described "appropriate the Work . . . to the Order" provision. It is our responsibility to attach meaning to this phrase as intended by the parties.[3]

Luckily, some of the terms within the provision are defined by the contract. "Work" is defined as "the goods, services and/or equipment and documentation to be provided under the contract. . . ." "Order" is not specifically defined, but it is plain from the contract that it refers to Totalmar's

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3. *See Reliant Energy Servs., Inc. v. Enron Canada Corp.*, 349 F.3d 816, 822 (5th Cir. 2003) ("'When interpreting a contract, the question is what was the parties' intent, [because] courts are compelled to give effect to the parties' intentions'" (quoting *Pennzoil Co. v. FERC*, 645 F.2d 360, 388 (5th Cir. May 1981))).

order for the modules.[4] It is not apparent from the plain meaning of the contract, however, what the parties intended by agreeing that title passes on appropriation of the work to the order. We therefore look to interpretive guides outside the text of the contract.

Venezuela calls our attention to cases in which this court and others interpreted a similar phrase, *i.e.*, "appropriate goods to the contract." Although Venezuela contends that this difference in phrasing is insignificant, it is in fact quite illuminating. In the cases cited,[5] the goods at issue were fungible, and the contracts called for the sale of a specified quantity of those goods.

For example, in *Mitsubishi*, 735 F.2d at 165, we held that "when goods to be delivered by the seller to the buyer become segregated from other goods or *appropriated to the contract* so that the objects to be sold are readily identifiable, the same becomes executed, and at that time title to the goods passes to the buyer" (emphasis added). Therefore, the phrases "appropriating goods to a contract" and "appropriating work to an order" indicate the physical segregation, setting aside, or other identification of a subset of goods apart from a greater stock. Such an act, and the accompanying passage of

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4. The parties do not dispute this.

5. *See, e.g.*, *Mitsubishi Int'l Corp. v. Clark Pipe & Supply Co.*, 735 F.2d 160, 165 (5th Cir. 1984); *Edgewood Co. v. Falkenhagen*, 92 So. 703 (1922); *Collector of Revenue v. J.L. Richardson Co.*, 247 So.2d 151, 156 (La.App. 4th Cir. 1971); *Texas Hay Ass'n v. Angleton State Bank*, 291 S.W. 846 (Tex. Comm'n App. 1927).

title per contract, allow a seller to complete performance of a contract so as to be able to demand performance by the buyer or at least to pass risk of loss to the buyer.

It is obvious, from the context of the cases relied on by Venezuela, that this provision is not helpful to its case. Here, the "work" to be appropriated is not of the fungible nature that usually causes the seller to seek protection by allowing it to pass title and risk by identifying the goods to be sold. It is unreasonable to believe that Elder intended to agree to yield title to the modules, piece by piece, irrespective of payment, by utilizing a contractual provision that historically has been used to protect sellers.

This interpretation is bolstered further by the International Commercial Terms, or "Incoterms," which the parties agreed would apply to the contract where not in conflict with its express conditions. The Incoterms are a set of international rules for the interpretation of trade terms, published by the International Chamber of Commerce.

The only use of the phrase "appropriated to the contract" by the Incoterms indicates that a seller in an FOB contract[6] may choose to pass title to goods, by clearly setting them aside or identifying them where the specified vessel of shipment fails to arrive or is otherwise unable to accept shipment. That is, the seller can shift risk and title by taking affirmative steps to identify the specific, fungible goods it intends to sell. The Incoterms, therefore, indicate that the disputed contractual phrase exists to protect the seller by

6. An "FOB" contract is one in which the buyer assumes risk of loss upon the seller's shipment of the contracted-for goods.

allowing it to shift risk at its prerogative by performing certain steps. This interpretation makes the most sense and is in accord with that given by the courts in the cases cited by Venezuela.

Venezuela counters that Elder purchased used modules, brought them to the construction site, and thereby appropriated them to the contract. Subsequently, according to Venezuela, with the addition of each item Elder installed in the modules, those items too were appropriated to the order.

Unfortunately, Venezuela cannot point to any case in which this piece-by-piece formulation of appropriating work to an order has been applied. Instead, provisions of the sort at issue here are unanimously used in the context of fungible goods. The disputed provision therefore is of no moment here[7] and could not have effected passage of title.

The interpretation reached by the district court was therefore correct. Title to the modules never passed from Elder.

AFFIRMED.

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7. The inclusion of this inapplicable provision could be explained if the contract used was adopted from a previous contract dealing with an entirely different set of facts. Although the evidentiary record is not illuminating as to the provenance of the contract, Venezuela suggested, at oral argument in the district court, that the form used as the basis for this contract came from a previous transaction in which Elder was involved. If true, this would lend even further credence to the notion that the "appropriate work to the order" provision is not applicable here.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION DATED FEBRUARY 19, 2004 AND FILED FEBRUARY 20, 2004

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

DOCKET NO. 2:02 CV 1685 (Lead)
2:02 CV 2517 (MEMBER)

JUDGE MINALDI

MAGISTRATE JUDGE WILSON

ELDER OFFSHORE LEASING, INC.

VS.

SAFE HAVEN ENTERPRISES, INC., ALTA S. BAKER AND JOHN BAKER

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there is no just reason for delay with respect to the entry of final judgment pursuant to Rule 54(b) as to the Judgment of this court issued in open court on February 19, 2004, holding that Elder Offshore, and not the Country of Venezula, is the legal owner of the modules at issue.

Appendix B

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this matter is not to be placed on the trial calendar pending the Rule 54(b) appeal.

IT IS FURTHER ORDERED that the Clerk of the Court administratively terminate this action, without prejudice to the right of the parties to file a motion to reopen the proceedings within 10 days of a disposition by the Court of Appeal.

Lake Charles, Louisiana, this 19th day of February, 2004.

s/ Patricia Minaldi
PATRICIA MINALDI
UNITED STATES DISTRICT COURT

APPENDIX C — MINUTES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION DATED AND FILED FEBRUARY 19, 2004

Date: FEBRUARY 19, 2004
Present: PATRICIA MINALDI, JUDGE PRESIDING
CATHY MARQUARDT, COURT REPORTER
JO ANN BENOIT, MINUTE CLERK

Court Opened: 10:15 A.M.
Court Adjourned: 11:15 A.M.

MINUTES OF COURT

Case number: 2:02-CV-1685
ELDER OFFSHORE LEASING INC., ET AL
vs. SAFE HAVEN ENTERPRISES, INC., ET AL

* * *

CASE CALLED FOR:

* * *

_X_ Other: Ownership Hearing

* * *

VERDICT, RULING & COMMENTS:
Case called for Ownership Hearing.
Argument were heard.
For the oral reasons assigned, the Court rules ownership will remain with Elder.
This ruling will be certified as a final judgment.
All exhibits previously submitted to the Court will be made a part of this hearing.